

STRATEGY THREE: EVALUATING WATER RIGHTS FOR TRANSFER TO TRUST WATER

It is important to know the characteristics of a water right before acquiring it. Factors such as a water right's seniority, historical use, transferable quantity of water, etc., will be evaluated to ensure that acquired rights are more than mere paper claims or rights. The program goal is to acquire "wet" water. Therefore, the evaluation of a water right must be performed prior to making a final acquisition. Preferably, a preliminary evaluation will be conducted as soon as a proposal is submitted and prior to determining and negotiating the value of the water right. The evaluation process can be complex and extensive, depending on a variety of factors such as:

- Type of transaction being negotiated (e.g., short-term lease, long-term lease, permanent purchase or donation)
- Status of the water right
- Number of diversions on the stream
- Availability of data and information

I. General considerations

1. Underlying document and basis for the water right

The initial assessment must first determine the foundation of the water right in order to understand the protections that may or may not be afforded the trust water right. If the right is a state-issued certificate, an adjudicated certificate of water right, or a perfected state-issued permit, the resulting trust water right can be "protected" from other junior water users in the watershed. The state's ability to regulate water users to protect a trust water right based on a water right claim is limited. This will be taken into account when considering using state funds to purchase or lease a water right claim. However, there may be value in transferring a water right claim to an instream flow in certain streams and under certain conditions.

2. Priority date

Attempts will be made to acquire water rights with senior priority dates. In some watersheds, junior water rights are frequently regulated in favor of senior water rights. In most cases these junior rights would have little value for increasing flows in water-short years.

3. Season of use

Some water rights are limited to a season of use that may not have much value to fish. One of the strategies of the trust water program is to return water to the stream when it would naturally occur. Changing the season of use may or may not be acceptable or desirable. The ability to store water in a reservoir for release at a later time may allow for changes in seasonal use that could help stream flows. For example, if water is stored in a reservoir and then released in pulses, it may serve to encourage out-migration of juvenile fish.

4. Interruptible/seasonal water use

Some water rights are subject to regulation in favor of adopted instream flows (based on 90.22 RCW, 90.58 RCW and accompanying Washington Administrative Codes). Other water rights have water availability limited by natural conditions, such as rights from small intermittent or ephemeral streams. The water right document may indicate a full season of use but the appropriation of water may be naturally limited to the amount of water occurring at the point of diversion. In most cases, these rights would have little value for increasing flows in water-short years. Interruptible water rights will not be considered for acquisition by the state.

5. Ground water rights transferred to the Trust Water Right Program

For the purposes of acquiring water rights for instream flows, the state will consider only those ground water rights where there will be a benefit to a surface water body within the timeframe when water is needed. Consultation and concurrence with state Department of Fish and Wildlife or other fisheries agencies will be required.

6. Validity and extent of the water right

In many cases, the process to transfer a water right to the trust water right program will mirror any other change in purpose of use. The water right should be evaluated and quantified, based on historical beneficial use by using records research, aerial photographs, applicant interviews and other evaluation techniques and procedures. In most cases, information regarding the last five years of water use will be necessary to determine the extent of the right and to quantify the trust water right.

7. Relinquishment

Prior to the state purchasing or leasing a water right, an evaluation of the water right will be made to ensure the water right has not been relinquished for non-use. Once the right is placed into the trust water right program, the right is exempt from relinquishment.

8. Inchoate transfers

Inchoate or unperfected water “rights” will not be considered for acquisition by the state. In order for the state to purchase or lease the right, a showing must be made of conserved water through efficiency changes or a reduction in consumptive use. For irrigation rights, this could occur through crop type changes or reduction of irrigated acreage.

9. Application required/not required

When an application is required, a standard change application form is submitted and must indicate a transfer/change from the existing use to instream flows. When an application is not required, Ecology has developed a form to be used to initiate the processing of the trust water right. **See Appendix III.** No fee is required for these transfers to the trust water right program.

10. Expedited processing under Washington Administrative Code (WAC) 173-152

In most cases, the application for transfer to the trust water program can and will be expedited for significant environmental benefit under WAC 173-152. This will require consultation and coordination with state Fish and Wildlife or other fishery agencies (e.g., NMFS, tribal fisheries managers, etc.) and a letter from that agency describing the environmental benefit to justify Ecology expediting the application processing.

11. Irrigation district rights

The state will not contract with any person to acquire a water right served by an irrigation district without the approval of that irrigation district's board of directors.

12. Transfers of claims

The evaluation of a water right to potential transfer to the trust water program is not an adjudication of the right and only a tentative determination of the validity of the right is made for the purposes of the change. The status of a donated right as a trust water is not evidence of the validity and quantity of the donated right

13. Location and “fish value”

The location of the primary and secondary reaches of the resulting trust water right is critical to the success of the trust water right. Ecology will consult with state Fish and Wildlife to determine critical streams and stream reaches (*see Strategy Two: Prioritizing Where and When to Acquire Water Rights*). Prior to the state acquiring the water right, an evaluation that takes into account the amount and the timing of the water will be made to determine its relative “value” to the fisheries resources.

14. Impairment

Throughout the trust water right statute, Revised Code of Washington (RCW) 90.42, there are explicit statements that a trust water right will not be created if it will involuntarily impair existing water rights.

15. Protection of the trust water right

The amount of protection afforded a trust water right is dependent on a mix of various factors such as the type of water right (claim, certificate), its priority among other water rights in the watershed and its location along the stream. The exercise of the trust water right and the methods and authority to protect the right by regulating other water rights is discussed later in **Strategy Seven: Protecting Trust Water and Evaluating Success.**

16. Processes and procedures

Depending on the type of trust water right proposed, different procedures must be followed in transferring the water right to the trust water program. The procedures for Permanent Trust Rights, Leases/Temporary Trust Rights, Donated Trust Rights, and trust rights arising from water conservation programs are discussed below.

Glossary of terms used in this chapter and associated Appendix III:

- **Application** – The standard Application for Change form is used for transfers to the trust water right program, when the requirements of RCW 90.03.380 apply to the changes.
- **Trust Water Right Form** – Applications to change some types of water acquisitions are not required. In these situations a form will be supplied to document and initiate the processing of the transfer to the trust water right program. This form is only to be used for donations into the trust program, short term leases, and conserved water through efficiency improvements.
- **Notice** – Refers to the standard public notice in the affected county or counties. Ecology will also provide notice containing pertinent information regarding the proposed trust right to all appropriate state agencies, potentially affected local governments, federally-recognized tribal governments and other interested parties. Note that some transfers are exempt from the upfront public notice process but they are subject to public notice if the trust water right is exercised.
- **Evaluation** – Refers to Ecology's evaluation of the extent and validity of the existing water right. In many cases, the process to transfer a water right to the trust water right program will mirror any other change in purpose of use. The water right should be evaluated and quantified based on historical beneficial use by using records research, aerial photographs, applicant interviews, and other evaluation techniques and procedures. In most cases, information regarding the last five years of water use will be necessary to determine the extent of the right and for quantifying the trust water right.
- **Quantification** – Refers to Ecology's determination of the amount of water transferred to instream flows. In some cases this is based on the highest water use within the last five years of water use. In other cases, the standard provisions of RCW 90.03.380 apply. This is the average of the two highest years of use within most recent five-year period of continuous beneficial use.
- **Decision Document** – Ecology's decision in the form of a Finding of Facts is the authorization of the trust water right. The final document issued varies. For permanent transfers up to two documents can be issued: A water right certificate to the state for the trust water and a superseding certificate or certificate of change for claims to the water right holder, if partial water right was acquired. For temporary transfers, the Finding of Facts document will remain active until the trust water reverts back to the right holder. If no Public Notice was made and there is no intention of protecting the water right, the Ecology will acknowledge the right has been placed into trust by a letter to the applicant similar to a transfer under RCW 90.03.390.
- **Impairment Analysis** – Is an evaluation to determine whether impairment of existing water rights will occur when the water right is changed to instream flows in RCW 90.42.040(4). Under some circumstances, transfers of water rights to the trust water right program are exempt from this upfront evaluation, until the trust water is exercised.
- **Exercise of Trust Water Right** – Refers to the circumstances when other water rights would or could be regulated in favor of the instream flow trust right.

II. Process and procedure specific to type of acquisition

1. Permanent trust water rights acquired through purchase:

- **A standard application for change/transfer** must be submitted. The requirements of 90.03.380 apply to these changes. All or a portion of a right may be acquired.
- **Standard public notice** of the proposed trust water right will be made in newspapers in the affected county or counties. The state must also provide notice containing pertinent information regarding the proposed trust right to all appropriate state agencies, potentially affected local governments, federally-recognized tribal governments and other interested parties.

- **Ecology will evaluate the extent and validity** of the water right. The water right will be evaluated and quantified based on historical beneficial use by using records research, aerial photographs, applicant interviews and other evaluation techniques and procedures.
- **Quantification of the trust water right** is based on the existing state guidelines developed under RCW 90.42.050, including determining the primary and secondary reach, if appropriate, and the instantaneous rate to be protected in each of the reaches. See section on quantification of the trust water right below.
- **For partial purchases**, the amount of the trust water right is the annual consumptive quantity calculated based on the average of the two highest years of use within the most recent five-year period of continuous beneficial use. For purchase of the total right the amount is based on the highest use within the last five years of continuous use.
- **An impairment analysis** will be made to ensure that existing water rights are not impaired.
- **A report of exam or findings of fact** will be issued that describes the extent of the right, quantification of the trust water right, and may include a description of the circumstances when other water rights will be regulated in favor of the trust water right.
- **For trust rights based on a state-issued certificate**, a superseding certificate will be issued to the state indicating the affected reaches and the instantaneous rate to be protected in each of the reaches. If a portion of the right was acquired, a superseding certificate will be issued for the remaining portion documenting the reduction of the water right. For trust rights based on a claim, certificates of change will be issued describing the trust water right and, if applicable, the remaining portion of the claim.

2. Short-term lease/temporary trust water rights (less than five years):

- **A standard application for change/transfer** must be submitted. All or a portion of a right may be acquired.
- **Public notice is not required** for short term leases until the state intends to exercise the trust water right for the first time. As a practical matter, standard public notice should be made during the processing of the trust water right in order to protect the trust right.
- **When two or more consecutive short-term leases are acquired** on the same water right, whenever the cumulative lease period exceeds five years, a standard change application is required as well as public notice and other legal requirements under RCW 90.03.380 will apply.
- **If the right is to be protected**, the trust right must be quantified including the determination of the primary and secondary reach, if appropriate, and the instantaneous rate to be protected in each of the reaches. The amount of trust water right cannot exceed the extent to which the water right was exercised during the five years before the acquisition. Nor may the total of the leased portion of a right together with the remaining original water right exceed the extent to which the right was exercised during the five years before the acquisition. This quantification is not evidence of the validity or quantity of the water right. Ecology may review claims of impairment and its decisions can be appealed to the state Pollution Control Hearings Board.
- **Short-term leases are exempt from an impairment analysis** prior to the water right being placed into trust. Ecology may review impairment claims and its decisions can be appealed to the state Pollution Control Hearings Board.
- **Ecology's decision in the form of finding of facts** is the authorization of the trust water right and will remain active until the trust right reverts back to the right holder. If no Public

Notice was made and there is no intention of protecting the water right, Ecology will acknowledge the right has been placed into trust by a letter to the applicant.

3. Long-term lease/temporary trust water right (greater than five years):

- **A standard application for change/transfer** must be submitted. All or a portion of a right may be acquired.
- **Standard public notice** of the proposed trust water right will be made in newspapers in the affected county or counties. The State must also provide notice containing pertinent information regarding the proposed trust right to all appropriate state agencies, potentially affected local governments, federally recognized tribal governments, and other interested parties.
- **Ecology will evaluate the extent and validity** of the water right and determine if the transfer will be detrimental to the public interest and whether it will impair existing water rights.
- **Quantification of the trust water right** is based on the state guidelines developed under RCW 90.42.050, including determining the primary and secondary reach, if applicable, and the instantaneous rate to be protected in each of the reaches. The amount of trust water right cannot exceed the extent to which the water right was exercised during the five years before the acquisition; nor may the total of the leased portion of a right together with the remaining original water right exceed the extent to which the right was exercised during the five years before the acquisition. This quantification is not evidence of the validity or quantity of the water right. Ecology may review impairment claims and its decisions can be appealed to the state Pollution Control Hearings Board.
- **Ecology's decision in the form of a finding of facts** is the authorization of the trust water right and will remain active until the trust right reverts back to the right holder.

4. Donation of a trust water right under RCW 90.42.080:

- **An application for change/transfer is not required**, however the applicant must submit a Trust Water Right Form (*see Appendix III*) to allow the department to process and track the trust water right. No fees are required. The transfer must be for the purpose of instream flows. The transfer may be permanent or temporary.
- **Public notice is not required** for donations of water to a trust water right until the state intends to exercise the trust water right for the first time. In order to protect the right instream, standard public notice is required.
- **An evaluation of the right must occur** since the resulting trust water right cannot exceed the water right as it was exercised during the five years before the donation.
- **The amount of trust water right shall not exceed** the extent to which the water right was exercised during the five years before the donation. This quantification is not evidence of the validity or quantity of the water right. This amount reverts back to donor or person from whom it was acquired when the trust period ends.
- **Donations of water to trust water rights are exempt from an impairment analysis** prior to the water right being placed into trust. Ecology may review impairment claims and its decisions can be appealed to the state Pollution Control Hearings Board.
- **Ecology will acknowledge the donation** to trust in the form of a letter documenting the trust water right.

- **If the donation is permanent and based on a state-issued certificate, a superseding certificate** will be issued by Ecology indicating the affected reaches and the instantaneous rate to be protected in each of the reaches. If a portion of the right was donated, a superseding certificate will be issued for the remaining portion documenting the reduction of the water right. For permanent donations based on a claim, certificates of change will be issued describing the trust water right and, if applicable, the remaining portion of the claim. Temporary donations will be acknowledged by a letter from Ecology describing the terms of the donated trust water right.

5. Partial donation of a trust water right under RCW 90.42.040(9):

- **A standard change or transfer application** must be submitted, and RCW 90.03.380 applies to these donations. The donations can be temporary or permanent but must be for the purpose to assist in achieving established instream flows.
- **Standard public notice** of the proposed trust water right will be made in newspapers in the affected county or counties. Ecology will also provide notice containing pertinent information regarding the proposed trust right to all appropriate state agencies, potentially affected local governments, federally-recognized tribal governments, and other interested parties.
- **Ecology will evaluate the extent and validity** of the portion of the water right to be transferred to the trust water right program and determine if the transfer will be detrimental to the public interest and whether it will impair existing water rights.
- **Quantification of the trust water right** is based on state guidelines developed under RCW 90.42.050 and RCW 90.03.380, the statute authorizing changes to water rights. This includes determining the primary and secondary reach, if appropriate, and the instantaneous rate to be protected in each of the reaches. The quantity of water is based on the average water use of the highest two of the last five years of water use.
- **A report of exam or findings of fact** will be issued that describes the extent of the right and quantification of the trust water right.
- **If a donation is permanent and based on a state-issued certificate**, Ecology will issue a superseding certificate indicating the affected reaches and the instantaneous rate to be protected in each of the reaches. If a portion of the right was donated, a Superseding Certificate will be issued for the remaining portion documenting the reduction of the water right. For permanent donations based on a claim, a change certificates will be issued describing the trust water right and, if applicable, the remaining portion of the claim. For temporary donations, Ecology's decision will be in the form of a report of exam or findings of facts and constitutes the authorization of the trust water right and will remain active until the trust right reverts back to the right holder

6. Conserved water projects (publicly funded):

- **A change or transfer application is not required**, however the applicant must submit a trust water right form (*see Appendix III*) to allow Ecology to process and track the trust water right. No fees are required. The right must have a priority date prior to 1991.
- **Standard public notice of the proposed trust water right** will be made in newspapers in the affected county or counties. Ecology will also provide notice containing pertinent information regarding the proposed trust right to all appropriate state agencies, potentially

affected local governments, federally recognized tribal governments, and other interested parties.

- **Ecology will evaluate the extent and validity** of the water right and determine if the transfer will be detrimental to the public interest and whether it will impair existing water rights.
- **Quantification of the trust right is based on the net water savings** as described in the state trust guidelines. When state money is involved, the recipient will convey all or a portion of resulting net water savings back to the state. If the project is funded through the Irrigation Efficiencies Grant program, the portion put into trust must be equal to or greater than the percent of cost share investment from this program. The final amounts may be negotiated. The water right holder and Ecology will specify the process to determine amount of water the water right holder would continue to be entitled to after project is complete. If the project is through an irrigation district, approval of the board of directors must be obtained and evidence of the district's authority to represent water-right holders must be submitted..
- **A report of exam or findings of fact** will be issued that describes the extent of the right and quantification of the trust water right.
- **If it is a permanent transfer, Ecology will issue a superseding certificate** indicating the affected reach and the instantaneous rate to be protected in the reach. If it is a temporary lease, Ecology's decision in the form of a report of exam or finding of facts is the authorization of the trust water right and will remain active until the trust right reverts back to the right holder.

A matrix summarizing the processing of water rights acquired into trust water for instream flows is included in **Appendix III**.

III. Quantification of the trust water right

1. Quantifying water rights acquired through purchases, leases or other means

There may be two distinct stream reaches for each trust water right transfer, depending on the circumstances:

- The **primary reach** is that portion of the stream that benefits from the reduced diversion and augmentation of flows in the reach directly below the historical point of diversion downstream to the point on the stream where any return flows resulting from the water use, have returned to the stream or the aquifer.
- The **secondary reach** is the reach downstream of the primary reach which is augmented by "salvaged" or non-consumed water which had not previously been available. Credit cannot be given downstream for the portion of the original diversion that previously ended up as return flows. Only the eliminated consumptive use can be considered as a downstream benefit.

Primary reach calculations

The primary reach begins at the original point of diversion. How far it extends downstream must be determined on a case-by-case basis but should extend downstream to a point where the decision-maker is reasonably sure any return flows from the diversion and water use have returned to the stream or aquifer system. Calculating the trust water right for the primary reach is a matter of determining the volume of water historically diverted or authorized under the water

right. This includes the water that will be consumptively used under the right as well as any transportation or carriage water. In many cases, the annual volume of water authorized by the water right will be less than the amount that could be diverted with a continuous diversion at the authorized diversion rate.

Since a trust water right cannot be issued for more water than that authorized by the water right, the volume of water determined to be the diversionary right is pro-rated throughout the period the water was historically diverted. The resulting trust water right for the primary reach will be a constant rate over the period of time the water was historically diverted.

Secondary reach calculations

The trust water right for the secondary reach is calculated by determining the historical consumptive use of the water. If the entire right is being changed to a trust right, the highest water use in the last five years can be used as the basis for the calculation. If a portion of the right is to be changed to a trust right, we are adding a purpose of use to the water right and the “average of the highest two of the last five years” water use (as described in RCW 90.03.380) should be used as the basis of the calculation.

There have been several methods used to determine the instantaneous rate of the trust water right of the secondary reach but all have been based on the consumptive use of the right. A description of the preferred method of calculating a trust water right, commonly called the “bell curve” method is included in **Appendix III**.

2. Quantifying conserved water put into trust program

Where water use efficiency is affected by upgrading to a more efficient irrigation system, there is no (or at least “no significant”) reduction in the amount of water consumptively used. The amount of water lost to the basin by evapotranspiration is the same after the efficiency upgrade as it was before the upgrade. The only difference is that there was a lot more conveyance loss and return flow before the irrigation system upgrade than there is after the upgrade.

The trust water right that efficiency upgrades create is present only in the reach between the historic point of diversion and the point where the last of the historic return flows returned to the stream. Efficiency upgrades allows less water to be diverted from the stream to satisfy the off-stream use, thereby allowing more water to be kept instream at the historic diversion point and increasing flows in the reach where those conveyance losses or return flows historically returned to the stream.

The trust water right created by efficiency improvements only applies to the primary reach. It cannot result in creating a trust water right in the stream reach below the last return flow point because efficiency improvements do not benefit or affect the stream below the last return flow point.